STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL PAGANO,

Plaintiff,

v

PONTIAC OSTEOPATHIC HOSPITAL,

Defendant-Appellant,

and

ALLEN MEDICAL SYSTEMS, INC., HILLENBRAND INDUSTRIES, INC., and HILL-ROM COMPANY, INC.,

Defendants-Appellees.

UNPUBLISHED
September 22, 2009

No. 285100
Oakland Circuit Court
LC No. 2006-073852-NH

Before: Sawyer, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Appellant appeals an order of the circuit court granting appellees' motion to exclude the testimony of appellant's expert witness and granting appellees' motion for summary disposition. Appellant appeals as of right and we affirm.

Appellant argues that the circuit court erred in excluding the testimony of its expert witness; utilized an incorrect burden of proof in apportioning fault, and erred in not finding issues of material fact in granting summary disposition to appellees. We disagree. This Court reviews a trial court's determinations concerning the qualifications of a proposed expert witness to testify for an abuse of discretion. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). Questions of law are reviewed de novo on appeal. *Kaiser v Allen*, 480 Mich 31, 35; 746 NW2d 92 (2008). A trial court's determination of a motion for summary disposition is reviewed de novo. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004).

Plaintiff was injured while being prepared for surgery at appellant Pontiac Osteopathic Hospital (POH). Plaintiff was anesthetized while he was lying with the lower half of his body strapped to the surgical table and the upper part of his body lying on a shoulder chair. The shoulder chair is a medical device manufactured and sold by appellee Allen Medical Systems, Inc. (Allen Medical). It attaches to the surgical table by utilizing its inverted "L" shaped clamps.

It replaces the upper portion of the surgical table. Once attached, the shoulder chair may be raised from the horizontal position to a sitting position so that the surgeons have increased access to a patient's shoulders.

While plaintiff was being raised into position for surgery, the shoulder chair detached from the surgical table. The upper half of plaintiff's body fell backwards to the floor. Plaintiff suffered injuries to his neck and back and filed suit to recover from appellant and appellees. Plaintiff's claim was settled during mediation. Appellant and appellees agreed to continue the case in the circuit court in order to apportion fault between them.

Appellant's first argument is that the circuit court erred in finding that the proposed expert testimony of Michael Leshner was unreliable. The admissibility of expert testimony is in the trial court's discretion. *People v Unger (On Remand)*, 278 Mich App 210, 216; 749 NW2d 272 (2008). An abuse of discretion occurs when the decision results in an outcome outside the range of principled outcomes. *Woodard*, *supra* at 557. If the trial court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert may testify to the knowledge by opinion or otherwise. *People v Dobek*, 274 Mich App 58, 93-94; 732 NW2d 546 (2007). Expert knowledge can assist the trier when there are facts that require expert interpretation or analysis and the witness' knowledge is of particular value. *Rouch v Enquirer & News of Battle Creek*, 184 Mich App 19, 39; 457 NW2d 74 (1990).

A witness may be qualified as an expert by knowledge, skill, experience, training or education. *Surman v Surman*, 277 Mich App 287, 308; 745 NW2d 802 (2007). MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Therefore, the opinion of an otherwise qualified expert must also be shown to be reliable, including the data underlying the expert's theories and the methodology by which the expert draws his conclusions. *People v Yost*, 278 Mich App 341, 394; 749 NW2d 753 (2008). MRE 702 requires the trial court to conduct a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from that data. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004).

Special statutory standards also apply to the admission of expert scientific opinion in actions based on death or injury to person or property. *Chapin v A & L Parts, Inc*, 274 Mich App 122, 128-129; 732 NW2d 578 (2007). MCL 600.2955(1) provides:

> In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible

> unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
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> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
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> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
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> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

In determining admissibility under the statutory standard, a court must consider the statutory factors, and the pertinent determination is whether a scientific opinion is rationally derived from a sound foundation. *Chapin*, *supra* at 127, 139.

Here, Leshner examined the shoulder chair involved in the incident for 15 to 25 minutes and reviewed several documents, including depositions; effects analysis documents provided by Allen Medical; documents from the Allen Medical website; and a catalogue of Allen Medical products. Leshner concluded that the clamp attaching the shoulder chair to the surgical bed was insufficient because it could slide off the end of the rail by bypassing a stop mechanism on the end of the rail, and it could become detached if not properly tightened. Leshner stated that the design of the clamp as an inverted "L" shape allowed for these possibilities because the bottom of the clamp was not as wide as the rail. He asserted than an industry standard "C" clamp would have been more appropriate. Leshner photographed the clamp and rail attachment to demonstrate these possibilities.

The circuit court determined that Leshner did not have a reliable scientific opinion on which to base his testimony. The circuit court stated that, assuming Leshner was qualified as an expert, he was not able to meet the reliability demands of MRE 702 and MCL 600.2955(1). The circuit court noted that Leshner's inspection of the shoulder chair was brief, said that Leshner was testifying about an industry standard that was not acknowledged elsewhere, and that Leshner

derived his opinion without consulting those in the industry. Significantly, the circuit court noted that Leshner did not conduct separate or independent testing to determine what is required of a clamp attaching a shoulder chair to an operating table. The court also stated that Leshner did not do any testing to generate evidence that a bigger handle should be used to tighten the clamps.

The data underlying an expert's opinion must be comprised of inferences or assertions derived from an application of scientific methods, and the inferences or assertions must be supported by appropriate objective and independent validation based upon what is known. *Tobin v Providence Hosp*, 244 Mich App 626, 647; 624 NW2d 548 (2001). Leshner did observe how the clamp of the shoulder chair could fail under certain conditions. However, there was no scientific investigation to derive an expert recommendation as to what clamp design would be best for the shoulder chair or how the inverted "L" clamp is defective when properly used. An expert must show that any opinion based on data expresses conclusions reached through reliable principles and methodology. *Gilbert*, *supra* at 782.

The circuit court did sufficiently state its reasoning for finding Leshner's opinion was unreliable in this case. The court's opinion addresses the lack of scientific testing to support Leshner's opinion, and the lack of industry involvement in Leshner's opinions. These reasons reflect the provisions of the statute. There appears to be an "analytical gap" between that data and the opinion expressed by Leshner. *Id*. at 783. Without more sound scientific evidence to support Leshner's hypotheses that the clamp design was deficient and there were better alternatives available, it is difficult to rely on his opinions. The circuit court's determination was within the range of principled outcomes. *Woodard*, *supra* at 557.

Appellant next argues that the circuit court inappropriately imposed a burden of proof on appellant in apportioning fault. As a part of the mediation agreement appellant and appellees agreed to "continue to litigate the matter of division of fault." They were to litigate on the single issue of what percentage of fault each bears for this claim. The fact finder was to apportion the fault to each so that the total equals 100 percent. Also, the agreement provided that "the parties do not waive any procedural or substantive defenses as would otherwise be available to them, including the filing of summary motions, motions in limine and such other matters as may be properly brought before the court." The agreement was silent as to any burdens of proof or procedures to be utilized in apportioning fault. Significantly, neither party admitted liability in the agreement.

Per the agreement, appellees filed their motion for summary disposition. The circuit court found that appellant did not have causation evidence because appellant's expert testimony was excluded and "POH's action fails as a matter of law." The circuit court said earlier in its opinion that appellant had to meet the required element of causation or summary disposition to "defendant" would result.

Appellant cites three statutes to support its assertions that there is no preponderance standard applicable to apportioning the relative liability of several defendants. MCL 600.2957(1) provides:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person

> shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

Similarly, MCL 600.6304(1) and (2) provide for the apportionment of fault as follows:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
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> (a) The total amount of each plaintiff's damages.
>
> (b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.
>
> (2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

Appellant argues that the circuit court was to let the jury apportion the percentage of fault from 0 to 100 relative to defendants. However, the fault of the parties had not been established.

The liability of the parties had to be established prior to determining their relative responsibility. MCL 600.2946(2) provides, in relevant part:

> In a product liability action brought against a manufacturer or seller for harm allegedly caused by a production defect, the manufacturer or seller is not liable unless the plaintiff establishes that the product was not reasonably safe at the time the specific unit of the product left the control of the manufacturer or seller and that, according to generally accepted production practices at the time the specific unit of the product left the control of the manufacturer or seller, a practical and technically feasible alternative production practice was available that would have prevented the harm without significantly impairing the usefulness or desirability of the product to users and without creating equal or greater risk of harm to others.

Additionally, it is well settled under Michigan law that a prima facie case for products liability requires proof of a causal connection between an established defect and injury. *Skinner v Square*

D Co, 445 Mich 153, 159; 516 NW 2d 475 (1994). The circuit court was charged with making a determination about the relative fault of the parties. Neither party conceded liability in the mediation agreement. The circuit court determined that appellant was not able to establish that appellees were at fault.

Indeed, the circuit court did not determine specific percentages of fault and dismissed the case before a jury could do so. However, the circuit court had already determined, as a matter of law, that appellant could not prove that appellees were liable at all, inferring that the apportionment of fault to appellees was zero percent. Appellant agreed that this was a products liability case and argued that appellees were liable because of the defect in their product. However, appellant was not able to establish the fault of the manufacturer.

Also, appellant has asserted inconsistent positions on this issue. Appellant introduced itself during the motion hearing as "the now plaintiff" and stated that "I presume I fit in to the plaintiff's seat." Appellant went on to say that this was a products liability case and that "the issue becomes whether or not we can show the manufacturer knew or should have known of the defect." Further, appellant evidently submitted jury instructions that acknowledged its burden to prove appellees' shoulder chair was not reasonably safe and that its design caused its detachment from the operating table. Waiver is the intentional relinquishment or abandonment of a known right and a party who expressly agrees with an issue in the trial court cannot then take a contrary position on appeal. *Grant v AAA Michigan/Wisconsin, Inc (On Remand)*, 272 Mich App 142, 148; 724 NW2d 498 (2006).

Next, appellant argues that the evidence presented to the circuit court was sufficient to establish the liability of appellees. When reviewing a motion brought under MCR 2.116(C)(10), the court considers the affidavits, depositions, pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the non-moving party. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

A manufacturer has a duty to eliminate any unreasonable risk of foreseeable injury from use of their products. *Cacevic v Simplimatic Engineering Co* (*On Remand*), 248 Mich App 670, 680; 645 NW 2d 287 (2001). The manufacturer of a product is not liable unless it is established that the product was not reasonably safe at the time the specific unit of the product left the control of the manufacturer, and a feasible alternative production practice was available that would have prevented the harm. See MCL 600.2946(2). This Court, in *Cacevic, supra* at 680, relied upon the following passage from *Reeves v Cincinnati, Inc*, 176 Mich App 181, 187-188; 439 NW2d 326 (1989), to describe the evidence required to establish a manufacturer's liability thusly:

> [A] prima facie case of a design defect premised upon the omission of a safety device requires first a showing of the magnitude of *foreseeable risks,* including the likelihood of occurrence of the type of accident precipitating the need for the safety device and the severity of injuries sustainable from such an accident. It secondly requires a showing of alternative safety devices and whether those devices would have been effective as a reasonable means of minimizing the foreseeable risk of danger. This latter showing may entail an evaluation of the

alternative design in terms of its additional utility as a safety measure and its trade-offs against the costs and effective use of the product.

In the current case, appellant argues that it was able to establish issues of material fact that the design of the clamp that attached appellees' shoulder chair to the operating table was responsible for plaintiff's injuries. In the record below, the testimony of Paul Skavicus, a product development engineer for Allen Medical, demonstrated that appellees determined that the shoulder chair had a major risk of separating from the operating table. Allen Medical then attached a warning label to the chair, which lowered the risk level from major to minor in Allen Medical's system. However, the warnings on the back of the shoulder chair were for a patient instability hazard, rather than the chair detaching, if the clamps from the chair were not correctly attached to the operating table. The warnings were not visible when the chair was flat and the operator would be raising it, but could be visible when attaching the chair to the table.

Plaintiff's expert, Bruce Barkalow, also testified that the clamping mechanism on the shoulder chair was not as good as it should be. Barkalow pointed out that the clamp does not fully engage the bottom of the bed rail, the level of tightening is subjectively based on a person's strength, and the warning is insufficient to warn of detachment. Barkalow said that the tightening of the clamp could feel proper even when the clamp is incorrectly mounted to the table rail. However, Barkalow was not sure if the shoulder chair slid off of the table rail or fell off the rail.

Appellant has not supplied any evidence that suggests that a properly secured clamp would malfunction or cause the shoulder chair to separate from the operating table. Barkalow thought that, during plaintiff's procedure, the clamps were not in the correct position, which is six inches from the end of the table rail. Barkalow believed that the shoulder chair became detached because the clamps attaching the chair to the operating table were not fully and properly engaged on the rails, and an inappropriate technique was used to raise the chair.[1] Skavicus found that there was a hazard if the clamps from the chair were not correctly attached to the operating table.

Appellant has not supplied information regarding "the likelihood of occurrence of the type of accident" from using the shoulder chair with the inverted "L" clamp. See *Bazinau v Mackinac Island Carriage Tours*, 233 Mich App 743, 757; 593 NW2d 219 (1999). This likelihood may be the calculated probability that the injuries were to occur. *Fisher v Kawasaki Heavy Industries, Ltd*, 854 F Supp 467, 470 (ED Mich 1994). Appellant was not able to raise a material issue of fact regarding the magnitude of foreseeable risks of the shoulder chair, including the likelihood of the failure of properly secured clamps. See *Cacevic*, *supra* at 680.

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[1] The physician raising the shoulder chair pushed on the back of the chair with one hand, while operating a knob with the other. The knob was not intended to be engaged yet when the physician was turning it. The chair was intended to be raised with a telescoping handle attached to the middle of the back of the chair.

Appellant was also required to show alternative safety devices for the shoulder chair. See *id*. Appellant asserted that all risk of the shoulder chair separating from the operating table would be eliminated by the use of a clamp that completely enveloped the rail of the surgical table. Appellant proposed the use of a "C" shaped clamp, rather than the inverted "L" shape. This design would ensure that the clamp could not slide off the rail because it would engage the stop mechanism on the end of the rail and it could not detach because it surrounds the rail.

In a design defect case, the trier of fact utilizes a risk-utility balancing test that considers alternative safer designs and the accompanying risk, as compared with the risk and utility of the design chosen. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 395; 628 NW2d 86 (2001). The Sixth Circuit Court of Appeals said that under the Michigan risk-utility test, an expert who testifies that a product could have been designed differently, but who has never made or seen the alternative design he proposes, and therefore has no idea of its feasibility, utility, or cost, does not make out a *prima facie* case that a reasonable, practicable, and available alternative design was available. *Peck v Bridgeport Machines, Inc*, 237 F 3d 614, 618 (CA 6, 2001).

There is scant testimony about an alternative design for the inverted "L" clamp. Barkalow said that the clamp was not as good as it could be, but did not offer an alternative. There was no testimony about the existence of a shoulder chair that attaches with a "C" clamp or any studies or tests done to determine the possibility, feasibility, practicality, or cost of using a "C" clamp on this model of shoulder chair. Appellees stated in the joint pre-trial statement that there is a deposition of Paul Licari, a design team member of the shoulder chair, that a "C" clamp was considered and rejected because it was not strong enough and would not fit over all operating table rails. A "C" clamp was suggested during testimony without evidence to support its application. There was no evaluation of the alternative design or its utility. *Cacevic, supra* at 680.

Affirmed.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra